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398752—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 338

PAULINE CONTRERAS BARRIENTES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 89–93; Pet. 9–13) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1956 (R. 94; Pet. 14). A petition for rehearing (R. 95–101) was denied on July 24, 1956 (R. 102; Pet. 15). The petition for a writ of certiorari was filed on August 21, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether federal officers used excessive force in executing a search warrant.

STATUTE INVOLVED

18 U. S. C. 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

In the United States District Court for the Western District of Texas, petitioner was convicted on a three count indictment charging narcotic violations, and was sentenced generally to three years and a hundred-dollar fine (R. 71–74).

In this Court, petitioner raises only the issue of the validity of the search by which the narcotics were obtained. Prior to trial, petitioner made no motion to suppress, but she moved to exclude the evidence after the officers had testified (R. 10, 38). The evidence on this issue may be summarized as follows:

A federal narcotics agent obtained a search warrant for petitioner's house. In the early afternoon of November 30, 1955, federal officers, accompanied by city police officers, approached the front and rear doors in separate groups (R. 8, 31, 35). Officer Saenz in the rear-door group knocked on the door which was very flimsy, and "it fell open and he fell * * * almost into the kitchen" (R. 9). The two federal officers in this group followed Saenz into the room, and announced that they had a search warrant (R. 9).

A copy of the warrant was presented to petitioner (R. 17, 51).

One officer immediately went through to the bathroom to prevent possible quick disposal of the narcotics in the toilet (R. 9, 16). As the officers entered, petitioner, her husband, and another woman were in the kitchen (R. 8, 16, 17, 24, 27, 33, 36) and a third woman and a child were in the middle room which lay between the kitchen and living room (R. 8, 16, 17, 24, 27, 32, 33, 36). Under some clothing in a washing machine in the kitchen, one of the federal officers who had entered by the rear door found a package of heroin (R. 10) which petitioner and her husband each claimed (R. 12, 13, 24). Additional heroin was found in a cookie jar by another officer who had entered through the rear door (R. 25).

The officers who had gone to the front pounded on the frames of two doors at the front of the house (R. 31, 32). After thirty to sixty seconds of unanswered knocking, a city police officer kicked the door and attempted to force it with his shoulder (R. 32). Failing still to receive a response, or to budge the door, he put his elbow through a pane of glass in the door, reached through, and opened it (R. 32). Petitioner's testimony on this point was that she was sick in bed in the middle room and got up when she heard the officer "fall down" as he entered the kitchen (R. 50). She said that she heard no knocking but only the sound of the kicking and the breaking glass (R. 50).

Although the *per curiam* opinion of the Court of Appeals affirming the conviction expresses the view

that the use of excessive force in serving a search warrant will not invalidate the search (Pet. 10), two of the three judges concurred in the result on the ground that the question of the effect of a search with excessive force need not be reached since the testimony showed that there was no excessive force here (Pet. 11–13).

ARGUMENT

As the majority of the court below held, the question raised by petitioner, as to the effect of excessive force in gaining entry to execute a search warrant, is not actually presented by this case.

With respect to the entrance made at the rear door, the record shows that at the officer's knock the door fell open so easily as to cause him to stumble over the threshold (R. 9). Thus, there was neither a refusal of admittance nor a breaking. The federal officers then immediately identified themselves and presented petitioner with a copy of the search warrant. The officers who entered at the rear were those who found the heroin. A lawful entrance was thus accomplished wholly independent of, and prior to (see R. 32), the happenings at the front door.

Even assuming, *arguendo,* that the breaking of the glass on the front door could be deemed excessive use of force in view of the fact that the rear door was open,[1] this subsequent trespass would not in-

[1] Considered independently of the events in the rear, the entrance at the front door was legally effected. The demand of admission with notice of authority, prior to forcing a door, presupposes some contact with someone on the premises. Blank

validate the original lawful entry and the search which followed it. *Zap* v. *United States,* 328 U. S. 624, 629; *United States* v. *Lee,* 274 U. S. 559, 563; *McGuire* v. *United States,* 273 U. S. 95.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1956.

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silence, either because the occupant fails to respond to the knock, or because he has absented himself from the premises, is tantamount to a refusal to admit any caller, regardless of his errand or authority, and justifies a breaking of the door by officers holding a valid search warrant. Here, the officers pounded on the door and then made efforts to force the door before they broke the glass. State courts interpreting comparable statutes have ruled that similar situations constituted sufficient compliance with the statutes. *Collins* v. *State,* 184 Tenn. 356; *Thigpen* v. *State,* 51 Okla. Cr. 28; cf. *Hiller* v. *State,* 190 Wisc. 369.

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